

RECORD OF ORAL HEARING  
UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ELECTRONIC FRONTIER FOUNDATION

Petitioner

vs.

PERSONAL AUDIO, LLC

Patent Owner

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Case No. IPR2014-00070

Patent 8,112,504

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Oral Hearing Held: December 17, 2014

Before SHERIDAN K. SNEDDEN, TRENTON A. WARD, and GREGG  
ANDERSON (via video conference), *Administrative Patent Judges*

The above-entitled matter came on for hearing on Wednesday, December  
17, 2014 at the U.S. Patent and Trademark Office, 600 Dulany Street,  
Alexandria, Virginia at 1:00 p.m., in Courtroom A.

APPEARANCES:

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P R O C E E D I N G S

(1:00 p.m.)

JUDGE WARD: Good afternoon. Welcome to the Patent Trial and Appeal Board. We're here this afternoon for the oral hearing for inter partes review matter Number IPR 2014-00070. It is an inter partes review proceeding in which Electronic Frontier Foundation is the Petitioner and Personal Audio, LLC is the Patent Owner.

The panel for the hearing today is my colleague, Judge Snedden, sitting here on my right, myself, Judge Ward, and also my colleague, Judge Anderson, who is joining us from our satellite office in Denver. Judge Anderson, good morning to you. Can you see and hear us clearly?

JUDGE ANDERSON: I can. Thank you, Judge Ward.

JUDGE WARD: All right.

I would like to start by getting appearances of counsel. Who do we have on behalf of Petitioner, Electronic Frontier Foundation?

MR. PETTUS: May it please the Board, Richard Pettus of the Greenberg Traurig law firm. With me is Vera Ranieri of Electronic Frontier Foundation and my partner, Nicholas Brown, who will be presenting the argument.

JUDGE WARD: Thank you, Mr. Pettus. And who do we have on behalf of the Patent Owner?

1                   MR. FEMAL: Yes, may it please the Court,  
2 Michael J. Femal on behalf of the Patent Owner, Personal  
3 Audio.

4                   JUDGE WARD: Mr. Femal, welcome to you.

5                   I have a few administrative details I want to go over  
6 before we get started with the arguments, primarily to talk  
7 about the format for the hearing. The trial hearing order that  
8 we entered in this case on November 28th instructed that the  
9 parties would each have 45 minutes to present their arguments.

10                  We're going to first hear from the Petitioner.  
11 Petitioner, you will present our arguments. And, Mr. Femal,  
12 the Patent Owner, will then be allowed to respond to present  
13 their arguments. And Petitioner, if you wish to do so, you can  
14 reserve time for rebuttal. Just indicate how much time you  
15 want at the beginning of your arguments.

16                  One administrative detail for counsel. I want to  
17 make sure that when you are referring to a demonstrative slide,  
18 please make sure to refer to the slide number. Judge Anderson  
19 attending remotely in Denver will only be able to hear you  
20 when you are speaking into the microphone and he will not be  
21 able to see what is shown on the projector here in the hearing  
22 room.

23                  So in order for Judge Anderson to be able to follow  
24 along with your arguments, make sure you are referencing the

1 slide number or particular demonstrative that you are relying  
2 upon so that Judge Anderson can follow along.

3 Counsel for Petitioner, do you have any questions?

4 MR. BROWN: No, Your Honor.

5 JUDGE WARD: Counsel for Patent Owner, any  
6 questions from you?

7 MR. FEMAL: No, Your Honor.

8 JUDGE WARD: All right. Petitioner, when you  
9 are ready.

10 MR. BROWN: Good afternoon.

11 JUDGE WARD: Good afternoon.

12 MR. BROWN: The Board should invalidate the  
13 '504 patent.

14 JUDGE WARD: Mr. Brown, did you want to  
15 reserve any time for rebuttal?

16 MR. BROWN: Yes.

17 JUDGE WARD: How much?

18 MR. BROWN: Please reserve 20 minutes.

19 JUDGE WARD: 20 minutes for rebuttal. Okay.  
20 Noted.

21 MR. BROWN: The Board should invalidate the  
22 '504 patent because Personal Audio made three arguments  
23 distinguishing the CNN/Compton reference in its response.

24 But in the deposition of Personal Audio's expert,  
25 Personal Audio's expert admitted that each of those arguments

1 is wrong. The first argument that Personal Audio made was  
2 that the table of contents file, contents.html in the CNN  
3 reference does not have a predetermined URL. But Dr. Nelson  
4 testified in his deposition that a URL exactly like the one  
5 disclosed in the CNN reference with a six-digit date code was a  
6 predetermined URL.

7           Personal Audio argued that the contents.html file in  
8 the CNN reference is not an updated compilation file, but  
9 Dr. Nelson admitted that the contents.html file is updated each  
10 day.

11           Personal Audio's third argument was --

12           JUDGE WARD: Mr. Brown, let me stop you right  
13 there on that particular point.

14           MR. BROWN: Yes.

15           JUDGE WARD: Updated each day. Isn't a new file  
16 created each day?

17           MR. BROWN: Let me put up the disclosure. It is  
18 -- appears to be a new file with the same name created by the  
19 same program in the same location each day.

20           There is a program called contents.c. That program  
21 contents.c, I am now on slide 18, and it shows figure 3 of the  
22 Compton reference and a piece of the text describing that  
23 figure. That program contents.c runs each day after the 3:45  
24 a.m. broadcast of the Newsroom show for that day and it

1 processes the content of that CNN Newsroom show each day to  
2 generate the file contents.html.

3           The reference doesn't specifically state how that  
4 contents.html file that is shown in the figure is put on to the  
5 web server at the URL with the date code that you can see in  
6 figure 1 and in figure 2. But -- and I am now on the next slide,  
7 slide 19 -- when I asked Dr. Nelson about this process, this is  
8 what his testimony was.

9           And, in particular, I -- he agreed that the file -- I'm  
10 sorry, the program contents.c runs each day. It generates the  
11 HTML file. And then as a result the contents.html file is  
12 updated each day.

13           JUDGE WARD: Mr. Brown, let me ask you, claim  
14 31 states "storing an undated version of compilation file in one  
15 of said one or more data storage servers" and then later states,  
16 "said updated version of said compilation file containing  
17 attribute data."

18           Doesn't claim 31 require that it is one compilation  
19 file that is updated and not a sequence of new files created each  
20 and every day that are unrelated?

21           MR. BROWN: Well, what the claim requires is that  
22 there be an updated version of a compilation file. The claim  
23 doesn't specify what that compilation file was before or what  
24 that compilation file is after. It has to be an updated version of  
25 a compilation file.

1                   JUDGE WARD: And how is this contents.html,  
2 how is that an updated version, let's say, for today, Wednesday,  
3 how is it an updated version of what -- of Tuesday's HTML  
4 file?

5                   MR. BROWN: Well, because each day it is updated  
6 to include the content for that day's CNN Newsroom broadcast.

7                   JUDGE WARD: So you would agree that it does  
8 not likely contain any content that would have been there the  
9 previous day? Each day is new content in the contents.html  
10 file?

11                  MR. BROWN: Correct, each day will be new  
12 content, generated in the same way based on the new content  
13 that was broadcast that morning. That is correct.

14                  However, I want to emphasize, the claim does not  
15 say there must be a single compilation file. It does not say that  
16 it must be a single file at a specific fixed unchanged URL. It  
17 says there has to be a file. It says that it must be an updated  
18 version of a file.

19                  And the issue, it seems to be, is whether the claim  
20 proscribes that an updated version is created in a particular  
21 way. And it doesn't. It doesn't say that the file has to be  
22 amended, that it has to have had old content in it and that old  
23 content has to either be replaced or supplemented. It just says  
24 there is a file, it has to have been updated, and that updated  
25 version of contents.html is described right there. In fact, the



1 patent specifically says -- I will find this slide site -- that it is  
2 updated.

3 I don't have the cite handy, I apologize.

4 So I am going to come back to where I was. There  
5 is the updated compilation file issue. The third argument that  
6 Personal Audio has made is that there is no compilation file at  
7 all because the news segments that are shown in figure 1 of the  
8 patent -- I'm sorry, of the CNN reference are not actually  
9 episodes, that what figure 1 of the CNN actually shows is a  
10 single episode that contains multiple segments.

11 Dr. Nelson was asked about this in his deposition,  
12 Personal Audio's expert, and he testified under the Board's  
13 definition of episode, as adopted in the Institution decision,  
14 that each of the individual segments shown in figure 1 of CNN  
15 are, in fact, episodes.

16 JUDGE WARD: Mr. Brown, what is the difference  
17 between an episode and a program segment?

18 MR. BROWN: A program -- if you have two  
19 program segments that might be completely unrelated to each  
20 other, they might not be episodes. What the patent describes as  
21 episodes are program segments that are related to each other,  
22 potentially, for example, because they should be played in  
23 sequence, potentially because they are parts of world news.

1           So, for example, I will refer you to -- I believe this  
2 is slide -- I am discussing column 30 of the patent. And I will  
3 give you the slide number, slide 22.

4           And what the patent describes here is that you can  
5 have program segments, which is the top box, it can be  
6 combined, now at line 31, combined with other related program  
7 segments to form a sequence of associated segments, here  
8 called a subject.

9           And then it goes on to explain in the next column,  
10 now column 30 at around line 18 onwards, that those subjects  
11 can include world news, national news, local news, et cetera.  
12 So --

13           JUDGE WARD: Didn't you argue in your reply  
14 brief that program segments can be related, even if they are  
15 only temporally related?

16           MR. BROWN: Correct. So, for example, the world  
17 news subject that's described here might contain five different  
18 subjects that would be temporally related in the sense that they  
19 are the world news of the day, of that day.

20           They might be about unrelated matters. One might  
21 be about the events that are occurring in Iraq. Another might  
22 be about the events that are occurring in Afghanistan. Those  
23 events might not be connected to each other.

24           The fact that two program segments of the world  
25 news are contained in the world news, doesn't mean that their

1 subject matter is necessarily related, but they are nonetheless  
2 related because they are both part of the world news. And  
3 that's exactly what we have.

4 JUDGE ANDERSON: So, counsel, when the  
5 preamble says "series of episodes," are you interpreting that to  
6 be related episodes?

7 MR. BROWN: Your Honor, I am interpreting that  
8 to mean related segments as the Board defined "episodes." In  
9 other words, an episode is related segments. And so I interpret  
10 "series of episodes" as the Board did in the Institution decision  
11 to be a series of related segments.

12 For example, as I have put up on the slide, world  
13 news or national news.

14 JUDGE ANDERSON: So does the "series of  
15 episodes" as it is used in the claim, is that an issue that's not  
16 among the three issues that I heard you articulate, that's not an  
17 issue here because the CNN, for example, has multiple episodes  
18 that are related in that they are all news, I gather, and thus they  
19 are a series of episodes?

20 MR. BROWN: That is our position. Personal  
21 Audio does dispute that the episodes shown in figure 1 of CNN,  
22 that those segments, excuse me, are episodes. Their argument  
23 is because one is about a collision at Jupiter and one is about  
24 genetically-engineered plants, because that subject matter is

1 different, they are not related, even though they are both part of  
2 the same day's CNN Newsroom broadcast.

3 That is the third argument that I was attempting to  
4 describe. On that point, though, the Board's initial definition  
5 of "episode," which is based on column 19 and 20, I believe, of  
6 the patent, column 19 of the patent, under that definition,  
7 Personal Audio's expert testified that the segments shown in  
8 figure 1 of CNN Newsroom are, in fact, episodes.

9 So here I have put up on the next slide, which is  
10 slide 23, the definition that was provided by the Board in the  
11 Institution decision, "a program segment represented by one or  
12 more media files, which is part of a series of related segments."

13 And I will quote to you what we put on page 6 of  
14 our reply brief, the testimony of Personal Audio's expert, and  
15 the question was: So under the definition that was adopted by  
16 the Board -- and I go on to read it -- under that definition, the  
17 two program segments that are part of the May 19 CNN  
18 Newsroom show that are shown in figure 1 are both episodes,  
19 correct?

20 "Answer: Yes, I think so."

21 So there is a dispute, but the evidence in the record  
22 shows that we are correct, that shows should be deemed  
23 episodes.

24 JUDGE WARD: Mr. Brown, can you give me an  
25 example under your proposed construction of "episode" and the

1 related construction of program segments, related program  
2 segments, I am understanding you to argue related program  
3 segments constitute an episode. Can you give me an example  
4 of a program segments that you consider to be unrelated?

5 MR. BROWN: Sure. I think it is simple. You can  
6 go back to figure 1 of the CNN Newsroom. So I went back two  
7 slides, and it is slide 21. And there is an image of figure 1 of  
8 CNN Newsroom.

9 So if these two stories, one which is about a cosmic  
10 collision near Jupiter and one which is about  
11 genetically-engineered plants, if those were on different web  
12 pages, they weren't both part of the CNN Newsroom show, one  
13 was reported by CBS at 1:00 p.m. on one day and another was  
14 reported by NBC at 8:00 a.m. three weeks later, they would be  
15 unrelated.

16 However, because they are both part of this CNN  
17 Newsroom show, they are part of the content that CNN selected  
18 to include in its educational broadcast each day, they are  
19 related by being part of the same show.

20 JUDGE WARD: Do you understand the difficulty  
21 that the panel has, though, in trying to determine the  
22 boundaries of what you are suggesting? You are telling us that  
23 if they show up on the same page on the same day, they are  
24 related, but if they show up on different pages on different  
25 days, they are unrelated.

1           Does it extend to -- well, maybe CNN changes to  
2 where this page is only updated every two days? Is there a  
3 certain amount of time that is required? Is there a certain  
4 amount of, if they are related web pages, but you gave us the  
5 example of CBS versus ABC. What if they were both CNN web  
6 pages but they were given on different days? Are those now  
7 somehow unrelated?

8           MR. BROWN: Well, I think that the answer to that  
9 question might not actually matter here, though what I do  
10 believe is that the example provided in the patent of subjects  
11 which consist of a series of related segments are world news,  
12 computer trade news, et cetera.

13           So the patent is explaining that segments of news  
14 can be grouped together by their subject matter because they  
15 are all world news. The patent doesn't distinguish, doesn't set  
16 the boundaries of episode in the way that you are describing.  
17 All the patent says is it is a series of related segments.

18           So I do understand the difficulty in an abstract  
19 sense, but I think that the patent provides the answer, at least  
20 with the specificity needed to reach a decision here, because  
21 what the patent describes as an episode is exactly what the  
22 CNN reference contains.

23           And then on top of that, I will just, if there is any  
24 concern about this, there has been no argument from Personal  
25 Audio that it makes any sort of technological difference what

1 the specific content is of the episodes that are being described  
2 in the patent.

3           If we take a step back and we look at what is  
4 described in claim 31, it describes a mechanism for distributing  
5 over the Internet a series of related episodes. But there is no  
6 argument that it could be done any differently or that it need to  
7 be done any differently if they weren't, in fact, related, if it was  
8 just a series of videos that had no relation to each other, all of  
9 the elements of the claim would function in exactly the same  
10 way.

11           And, as a result, an argument that the specific  
12 subject matter and the degree of relatedness of the specific  
13 episodes, any argument that that somehow lends patentability is  
14 inconsistent with the law of a non-functional descriptive  
15 material. So in the Mathias case that we cited in our reply,  
16 there was a patent which required a pop-up window to be  
17 displayed over a sporting event.

18           And there was a prior art where it would pop up the  
19 window, it would display it over the television, but it wouldn't  
20 display it during the sporting event. It would display it during  
21 an interview after the sporting event or before the sporting  
22 event started.

23           And the conclusion in that case was that it doesn't  
24 make any difference what the content is of the television show  
25 that is being displayed under the pop-up window. You can't

1 rely on that type of non-functional descriptive material for  
2 purposes of patentability.

3 So even if the patent didn't describe episodes  
4 exactly in the same way that CNN describes episodes, it still  
5 wouldn't be able to defend the '504 patent.

6 JUDGE WARD: Let me make sure I understand you  
7 perfectly, though, Mr. Brown. You do agree, Petitioner does  
8 agree that the term "episode" as used in claim 31 requires a  
9 certain amount of relation between segments; is that correct?

10 MR. BROWN: That is correct. The Board's  
11 definition, we believe is correct. It is based on the disclosure.  
12 So I have put up slide 23. The definition that we proposed and  
13 the Board adopted in the Institution decision was "a program  
14 segment, represented by one or more media files, which is part  
15 of a series of related segments."

16 And that is based directly on the language of the  
17 patent as cited in the Institution decision, column 19, 35 to 42.

18 If there are -- I will now turn briefly to the CBC  
19 reference.

20 The CBC Patrick reference is a reference that  
21 describes a program that digitized radio shows from the  
22 Canadian Broadcasting Corporation and distributed them over  
23 the Internet through FTP and through the World Wide Web.

24 Let me go to slide 26.



1           And the situation with this reference is very similar  
2 to the CNN reference. The primary argument that Personal  
3 Audio made against Patrick CBC reference seems to be that  
4 because there is no actual picture in the reference of the table  
5 of contents page for a radio show, and we focused in our papers  
6 on the Quirks & Quarks radio show that was broadcast, that  
7 because there is no picture in the reference of the web page for  
8 that radio show, that the web page might not be there, that the  
9 web page might not have a URL, that it might not be what is  
10 required to anticipate the claim.

11           However, again, Personal Audio's expert did not  
12 support that argument. Dr. Nelson admitted in his deposition  
13 that a person of ordinary skill in the art "would understand"  
14 from the Patrick reference that there was, in fact, a web page  
15 there, even though it wasn't specifically pictured. Specifically  
16 he admitted --

17           JUDGE ANDERSON: Isn't Patrick used in your  
18 petition to assert unpatentability based on anticipation, though?

19           MR. BROWN: Yes, Your Honor, it is. And the  
20 question on anticipation is whether a person of ordinary skill in  
21 the art would understand from the reference that each element  
22 of the claim was present.

23           And here the fact that they didn't put a picture of  
24 the web page in doesn't mean that a person of ordinary skill in  
25 the art seeing the description of providing the content through

1 the World Wide Web would understand that a web page might  
2 be absent.

3           Personal Audio's expert admitted that on reading  
4 this Patrick reference, they would understand that a web page  
5 was or a set of web pages was present.

6           And it is like if you had a paper which describes a  
7 car but didn't mention a steering wheel, a person of ordinary  
8 skill in the art might understand that the car had a steering  
9 wheel.

10           JUDGE WARD: Mr. Brown, you agree that the  
11 reference itself, Patrick, does not disclose specifically a table  
12 of contents-type of web page?

13           MR. BROWN: No, I don't agree with that. I  
14 apologize if I was unclear. It does disclose that to a person of  
15 ordinary skill in the art. It doesn't contain a picture of the web  
16 page.

17           Let me show you what it does disclose. Excuse me,  
18 let me go back. I am now at slide 27. And at slide 27 we have  
19 a quote from pages 2 to 3, which shows that it was made  
20 available through the Internet on the World Wide Web. That's  
21 data point number 1.

22           It explains that programs were broken into segments  
23 that had accompanying text, so users could select the parts of  
24 the program that were of interest to them. That's slide 28.

1                   Going to slide 29, I will keep going to slide 30, it  
2 explains --

3                   JUDGE WARD: Let me ask you to go back to that  
4 quote that you just gave us. This is disclosure that I have  
5 looked at closely. The language in this sentence says "the  
6 larger programs were broken into segments that were described  
7 in accompanying text."

8                   Would you agree that the text accompanies the  
9 broken segment?

10                  MR. BROWN: Yes, I would.

11                  JUDGE WARD: So in --

12                  MR. BROWN: That's repeated elsewhere in the  
13 reference.

14                  JUDGE WARD: -- downloading the segment, I  
15 would receive the accompanying text?

16                  MR. BROWN: I think -- I think not. I think what  
17 that sentence says is -- keep in mind, this is 1996, when  
18 bandwidth was not as good as it is today. And when people  
19 were thinking about downloading an audio file and they wanted  
20 to make sure they were only downloading the parts of the audio  
21 files that were of interest to them, so they wanted to be able to  
22 look at the text and know what they were getting before they  
23 downloaded it.

1                   So what this sentence says to a person of ordinary  
2 skill in the art is: You need to read the text so you know what  
3 you are getting before you click on the link and get it.

4                   So for -- there is -- and, as I have said, that is  
5 repeated later on. For example here, now on slide 20 -- excuse  
6 me, 30, we're specifically describing Quirks & Quarks. It  
7 points out that you can select portions of the show that were of  
8 interest to you and download them.

9                   And then the next slide, slide 31, "each show has a  
10 menu attached to it to describe the contents of the various  
11 parts."

12                   So what is disclosed here? What is disclosed is that  
13 there is the Quirks & Quarks show. I want to go back one slide  
14 to slide 30. There is a Quirks & Quarks show, which is  
15 regularly updated on the server. We know from the next slide,  
16 slide 31, it has a menu. We know from that description and  
17 here that it describes the contents of each of the segments of  
18 that Quirks & Quarks show in enough detail that you can pick  
19 out the particular segments that you want to download and then  
20 download them.

21                   What it doesn't say specifically is here is a picture  
22 of what this looks like when you go to that site on the World  
23 Wide Web. It tells you that it is on the World Wide Web, and  
24 it tells you that this is what is -- the information that is  
25 available to you.

1                   And based on that disclosure, Personal Audio's  
2 expert -- and I will read it to you -- acknowledged that there  
3 must -- excuse me, that a person of ordinary skill in the art  
4 would understand, "would understand from the article" that  
5 there was a web page or a set of web pages that provided this  
6 information. And that's -- the cite for that is 119:6 through 123  
7 of the Nelson deposition.

8                   JUDGE WARD: Mr. Brown, that is the end of your  
9 20 minutes. You are now going into your rebuttal time. You  
10 may continue, if you wish.

11                  MR. BROWN: Thank you.

12                  MR. FEMAL: May it please the Court, if we could  
13 hand up, since there is no ELMO.

14                  JUDGE WARD: Yes, you may, Mr. Femal.

15                  MR. FEMAL: Thank you, Your Honor.

16                  JUDGE WARD: Are these the same as provided to  
17 the Board?

18                  MR. FEMAL: The exact same, and provided to both  
19 counsel here for the Petitioner.

20                  JUDGE WARD: Thank you.

21                  MR. FEMAL: May it please the Court, first of all,  
22 to begin with, a question not really answered to Judge Ward,  
23 the compilation file does have all episodes listed. It is a single  
24 file. It is quite clear from the patent application as it is defined  
25 that it is.

1           And the Petitioner, during the deposition of Mr.  
2 Nelson, asked questions about the segment. The segment starts  
3 at column 29 of the patent and refers to news and other things  
4 that may be in a compilation file, but the last reference to  
5 episode stops at column 21 at the top.

6           And so there is definitely a demarcation between  
7 episodes and segments. And claims mean something. And in  
8 these two references cited here, the CBC Patrick reference  
9 hardly has any of the claimed elements required to invalidate  
10 the claim or to anticipate the claim.

11           JUDGE WARD: Mr. Femal, before you leave the  
12 point, I want to ask you about episode and segment.

13           MR. FEMAL: Yes.

14           JUDGE WARD: Can you describe for me the  
15 difference between an episode and a segment?

16           MR. FEMAL: An episode to me is very clear. If  
17 something is related to one another, that would be an episode,  
18 such as, let's say, currently Seinfeld, a bunch of episodes are  
19 all related to one another.

20           On the other hand, on the segments shown in the  
21 CNN/Compton article, you have unrelated matter.

22           And as the Court in the construction of the claim  
23 said, related. There is nothing related between, as we put in  
24 our brief, Jupiter and genetic vegetables. At best --

1                   JUDGE WARD: Mr. Femal, under your  
2 construction then, "relation" would require what? How should  
3 we construe relation, thematically related?

4                   MR. FEMAL: Your Honor, I would say that it is  
5 thematically related, that, in other words, that the episodes are  
6 related to one another with a common theme. And clearly it is  
7 not in the CBC radio or in the Compton.

8                   JUDGE WARD: Would you consider one segment  
9 pertaining to world news and one segment pertaining to local  
10 news to be related, they have a common theme of news?

11                  MR. FEMAL: Well, I would say that those are just  
12 segments, Your Honor, not episodes. They are just -- an  
13 episode is a complete thing of the same theme, as defined in  
14 columns 1 through 29 or 21 of the patent. And when you get to  
15 column 29, it starts talking about segments.

16                  JUDGE WARD: Again, the panel, there is  
17 difficulty in attempting to determine the proper boundary for  
18 terms like this. Give me the proper boundary that you would  
19 propose to the panel for "theme." How do I define what is  
20 within a theme and outside of a theme?

21                  MR. FEMAL: Okay. Well, I would say in a theme,  
22 let's say you have a segment -- or not a segment -- but an  
23 episode of House of Cards. It is all about the Congressional  
24 Whip or Head of the House, House Speaker, and every segment  
25 or every episode after that is related to that same theme. They

1 are going through the life of the Speaker of the House. That  
2 would be episodic. That would be episodes.

3 If you have news programs, each day they are  
4 updated, they are put away. How are they related? Yesterday's  
5 news is just that, yesterday's news. Seldom do they ever go  
6 back to it. And, in fact, in the CNN article, as well as even in  
7 the radio, because of limitations of space at this time, they just  
8 took them off the archive.

9 JUDGE WARD: So under your definition are you  
10 telling me that there needs to be some level of consistency in  
11 character or plot?

12 MR. FEMAL: There has to be some consistency. It  
13 can't be unrelated.

14 JUDGE WARD: Well, CNN uses the same anchor  
15 for their news program. Is that enough theme consistency?

16 MR. FEMAL: To have the same person do the  
17 news? I don't think so. People are not particularly after a  
18 person that does it. It is -- it is -- news is different every day.  
19 Those are going to be different, you know, segments. They are  
20 not going to be related.

21 One may --

22 JUDGE ANDERSON: So, counsel --

23 MR. FEMAL: Yes.

24 JUDGE ANDERSON: Counsel, so I am going to go  
25 back to what I asked Petitioner's counsellor. Is the series of



1 episodes the hook on which you would say in part that  
2 everything -- that the episodes must be related?

3 MR. FEMAL: I would say yes, Your Honor.

4 JUDGE ANDERSON: Is that a yes?

5 MR. FEMAL: Yes.

6 JUDGE ANDERSON: Okay. So in the  
7 specification, I am looking at the '504 patent, column 19,  
8 beginning at line 35, it says that "programming may include  
9 serialized sequences of programs, a given program segment  
10 may represent an episode in a series, which is selected as a  
11 group by the subscriber or" -- and it goes on.

12 So isn't a series of episodes simply something that  
13 is selected by the person who is making the compilation?

14 MR. FEMAL: The person selecting the  
15 compilation, if you are going off an episode, it would be an  
16 episode of Seinfeld, an episode of House of Cards, you  
17 wouldn't necessarily go House of Cards and then throw in  
18 something about cooking. That wouldn't be related.

19 JUDGE ANDERSON: What if I am interested in  
20 both those subjects and I decide as the person that is going to  
21 make this available to make that my series of programs, series  
22 of episodes?

23 MR. FEMAL: Those aren't --

24 JUDGE ANDERSON: Is that not precluded?

1           MR. FEMAL: Those aren't episodes, those are  
2 segments. And you may have a topic like in the CNN article,  
3 school, and you have a bunch of unrelated things about school.  
4 One may be about the Board of Education, a legal matter. One  
5 may be about building a school.

6           JUDGE ANDERSON: Okay. So let me get back to  
7 my question. If something is selected as a group by the  
8 subscriber, is that not a series? It doesn't say that it has to be  
9 related. It just says it is selected as a group.

10          MR. FEMAL: Well, yes, if he selects a group of  
11 construction things, that may be his idea of a series of  
12 segments.

13          JUDGE ANDERSON: So is it that -- is it that  
14 flexible, whatever the subscriber decides, is a series of  
15 episodes?

16          MR. FEMAL: I don't think it is necessarily up to  
17 the party to determine whether he is doing an episode or if he is  
18 doing segments. I think if he is doing segments, simply start at  
19 column 29 in the patent and move forward and it describes  
20 segments.

21          You can download news things. You can download  
22 things about animals, anything you want. Put it in a group if  
23 you want. There is that flexibility. Claim 31 deals specifically  
24 with episodes.

1           And then turning to the arguments that Petitioner  
2 made about the expert in the case, the expert after each one of  
3 these series of questions, you can read the transcript, is not  
4 changing his testimony.

5           And what the Petitioner cleverly did is ask  
6 questions about segments. Because if you look at the  
7 reference, he is talking about column 29. He is off on  
8 segments. He is not talking about episodes. He was very  
9 careful not to mention the word episodes when asking him  
10 those questions.

11           So he went off on a tangent. And he asked  
12 questions and I think Mr. Nelson answered truthfully. I  
13 objected when he tried to say that somehow this is  
14 predetermined, episodes at an URL, things like that, there is  
15 objections in the transcript. But very clever, went off on to  
16 segments, and segments are mentioned in the patent. There is  
17 no question about it. If someone wants to put segments in  
18 there, they are more than free to do so. And that goes for each  
19 one of his cites.

20           Mr. Nelson, after each one, Mr. Nelson answers  
21 truthfully what, you know, is hypothetical. And, in fact, the  
22 Petitioner went off on asking Mr. Nelson when he wanted to  
23 drive the point home on predetermined URL, whether or not  
24 hypothetically if I had an algorithm that allowed you to do that.  
25 And Mr. Nelson said: What algorithm?

1           And that's the problem with both of these  
2 references. They lack structure. They lack diagrams. And  
3 when asked the question of their expert, is an URL referred to  
4 in the article, Patrick CBC radio, in a moment of clarity and  
5 honesty, Mr. Schmandt said there is no reference to an URL.

6           So what the Petitioner is trying to do with both of  
7 these articles is fill in an inherency argument, must be  
8 inherency because it is not shown in structure. And to fill in  
9 what they claim is a ordinary person skilled in the art, Mr.  
10 Schmandt takes the position, he is a professor at MIT that was  
11 steeped in the thing, and here you have inventors that don't  
12 even have a formal education, came up with the idea because  
13 people, ordinary people worked in this area and they didn't  
14 have advanced degrees.

15           And this is the beginning of the Internet. And some  
16 of the recent things that came on line, Netscape in the  
17 early-to-mid '90s affected by marked entries in the founder, in  
18 one of the founders. And Explorer didn't come along until  
19 Windows 95. And then it was just one or two percent of the  
20 Internet.

21           And some of those still had the blue screen of death  
22 when you tried to put in an address and get somewhere.  
23 Because I certainly remember that. I go back far enough that I  
24 remember the blue screen of death and a lot of those.

1           JUDGE WARD: Mr. Femal, do you have a proposal  
2 as to the person of ordinary skill in the art with respect to this  
3 claim?

4           MR. FEMAL: Yes, we do. And it is the definition  
5 that was put in by our expert, Mr. Nelson. He is a person with  
6 a couple years experience working in the field, maybe having a  
7 computer --

8           JUDGE WARD: Working in what field, Mr. Femal?

9           MR. FEMAL: Working just with the Internet,  
10 playing around with it, and also might have a little bit of  
11 computer science background, may. But it is not a high level in  
12 '95 or '96.

13           JUDGE ANDERSON: So, counsel, with respect to  
14 the CNN argument, ground, so that's an obviousness challenge.  
15 What does your expert say -- and I looked a little bit -- but  
16 does he say anything to suggest that we could go look at that  
17 says that the computer -- that the -- some of the hardware, the  
18 data storage servers, communications interfaces, processors,  
19 that those are not present or would not be understood to be  
20 present by a person of ordinary skill in the art with respect to  
21 the CNN reference?

22           MR. FEMAL: With all due respect, in the CNN  
23 reference, you have a digital, audio, video, and distribution  
24 system that utilizes a signal capture compression. There is

1 encoding, if you look at the front end of the diagram, which  
2 they don't show the entire thing.

3           This is a very advanced thing where you trying to  
4 take analog video, which is a very huge file, convert it to a  
5 digital file, requiring extensive things not really used by the  
6 ordinary person skilled in the art at the time. You are talking  
7 satellite. You are talking encoding. You are talking massive  
8 files.

9           I think in the article, CNN article mentions 27  
10 terabytes for an example of trying to store a few video files.  
11 And the video files --

12           JUDGE ANDERSON: But my question, my  
13 question is Mr. Schmandt seems to say that the hardware is  
14 there. You don't seem to argue in your brief that the hardware  
15 isn't. And so this is your opportunity to tell us that it isn't.  
16 And I gather you are saying that right now.

17           My question is does your expert support that  
18 position?

19           MR. FEMAL: The expert in his expert report does,  
20 does support that the elements of the claims are not there, claim  
21 31. Essentially you don't have a compilation file. You don't  
22 have an updating of a single file that has all the episodes in it.

23           The CNN is quite clear that each day you have a  
24 brand new -- if they want to call that a compilation file -- they  
25 have a brand new contents file unrelated to the other days.

1 Each day is a brand new day in the CNN. And as far as  
2 hardware goes --

3 JUDGE WARD: How do you respond to the  
4 Petitioner's argument with respect to that updated compilation  
5 file, that it can be updated in the sense that the data changes, as  
6 long as it is the compilation file?

7 MR. FEMAL: There is no compilation file in CNN,  
8 zero.

9 JUDGE WARD: You don't agree that contents.html  
10 is a compilation file?

11 MR. FEMAL: Absolutely not. And, moreover, to  
12 even get to the final thing, you are talking hardware now, that  
13 diagram showing the contents file, if you go down the row  
14 there, there is a file after the contents. If you follow the line  
15 down to where it is going to be distributed out, talking about  
16 them shooting themselves in the foot, you have a mergeTC.C  
17 file. What in the heck is that?

18 Special software to try to get you to a point where  
19 you can distribute the content. I have no idea what that is. It  
20 is not explained in the CNN article.

21 In fact, the article is replete with talking about  
22 specialized software, specialized structure to get to your video  
23 that is broadcast out to a web.

24 JUDGE WARD: But does claim 31 prohibit the use  
25 of such software or hardware?

1           MR. FEMAL: Claim 31 has nothing to do with  
2 encoding video from what I can see from a satellite and having  
3 special proxy servers on the player end.

4           JUDGE WARD: But you would agree that as long  
5 as I meet the elements of claim 31, and may in addition encode  
6 video or do other things --

7           MR. FEMAL: If you meet all the elements of claim  
8 31, obviously you would have it, but there is no meeting of the  
9 claim language. It is just simply not there.

10          JUDGE ANDERSON: Do you have a dispute at this  
11 time with the construction we gave to compilation file in the  
12 decision instituted, that being that simply a compilation file is  
13 a file that contains episode information?

14          MR. FEMAL: Yes, episode information.

15          JUDGE ANDERSON: You don't think that should  
16 be part of the construction?

17          MR. FEMAL: You know, the compilation file  
18 would contain episode information. Here with either the CNN  
19 or CBC references, there is no compilation file. Also you will  
20 not find the word "updating," because it is not updated. Once it  
21 is fixed, it is affixed. There is no compilation. They don't  
22 compile anything.

23                Each day is a brand new day in the CNN News.  
24 And each day on the radio for the Quirks series, an hour show  
25 broken into segments, it is the same show. All of a sudden you



1 take the same show that is an hour show, you break it into  
2 segments, now it becomes an episodic show?

3 JUDGE ANDERSON: So, as I understand it, you  
4 don't have -- you don't have any dispute with the current  
5 construction, with the preliminary construction of "compilation  
6 file," you simply are saying that both CNN and the CBC don't  
7 contain episode information, they contain segment information;  
8 is that right?

9 MR. FEMAL: They contain segment information,  
10 Your Honor, and they also lack any compilation.

11 JUDGE SNEDDEN: Let me see if I understand.  
12 The way I understand your argument, the way I read your  
13 response is that you are essentially arguing that the claim  
14 requires or references episodes. And what is disclosed in the  
15 CNN reference, for example, is not episodes, rather, what is  
16 being uploaded or put on the CNN web page are segments of a  
17 single episode. And that is done because these files are large.  
18 Have I got it straight so far?

19 MR. FEMAL: He is uploading a two- to  
20 three-minute segment of the news broadcast.

21 JUDGE SNEDDEN: The news broadcast. And the  
22 reason why it has to be broken up into these such segments is  
23 because the entire broadcast cannot be loaded because of the  
24 size of the files?

1           MR. FEMAL: Well, you can't upload because of  
2 the size of the file, that's correct, Your Honor. The article says  
3 so.

4           JUDGE SNEDDEN: So they are broken up into  
5 segments that are then available, you know, on the web site, but  
6 this is not a compilation file because every day this entire page  
7 is replaced?

8           MR. FEMAL: It is replaced every day, Your Honor.

9           JUDGE SNEDDEN: So you can't access previous  
10 episodes, only segments of a current episode?

11          MR. FEMAL: You would have to go back and try  
12 to find whatever that URL was in the URL of the CNN  
13 broadcast, upload that to find out what the content is, because  
14 there isn't a single compilation file.

15          JUDGE SNEDDEN: So the compilation file would  
16 require one or more episodes contained in that file?

17          MR. FEMAL: Yes. For example, if you -- if you  
18 are experienced with Netflix or something like that, you go to  
19 Netflix.

20          JUDGE SNEDDEN: I understand that.

21          MR. FEMAL: All the episodes are listed there, all  
22 the series are listed, every year, every episode. That's a  
23 compilation file, you know where everything is.

1           With CNN you have to go back and upload whatever  
2 day it is and you have to know what the URL was for that  
3 segment or that news cast for that day.

4           And every day a brand new contents file is created.  
5 It has no relationship to the other content files. And that, as  
6 far as the patent is talking about, is not a related episode.  
7 There is no relationship. You know, different content files,  
8 different things.

9           JUDGE SNEDDEN: Well, they are related in the  
10 sense that they are temporally related, they are on the same  
11 day?

12          MR. FEMAL: Well, that's the definition the  
13 Petitioner used to try to pull an inherency argument.

14          JUDGE WARD: I would like to try to understand  
15 the statement you made in your response. You told us that the  
16 Board improperly imported a concept of a segment into our  
17 definition of episode. And I would like to understand your  
18 distinction between a program and a segment.

19          MR. FEMAL: On the episode definition, you pulled  
20 in what is referred to in the patent after column 29, talking  
21 about segments, and someone having a group of related or  
22 unrelated things about fishing, for example. It has a bunch of  
23 articles. That's fine. There is nothing wrong with that.

24          As far as we're concerned, news, news things are  
25 unrelated, pull in news in a group, whatever you want to pull in

1 as segments or programs and the programs, due to the size in  
2 the CNN article, you couldn't have a whole presentation at once  
3 because you couldn't download it.

4 And if you look at the structure shown, they have  
5 special proxy servers. And things are downloaded in the  
6 evening because the files are so big, you can't really show  
7 those. In other words, if a person as called for in this patent,  
8 especially when you get down to the end of the patent, ABC,  
9 and requests those things, those elements, you can't do with  
10 CNN. You have to download the night before the segments.  
11 And if you look at that structure shown in that drawing, yes, it  
12 shows a web server, and then it shows the Internet, but then it  
13 shows a bunch of proxy servers because the only place that the  
14 CNN articles went to are schools that could afford proxy  
15 servers and very expensive boards that would allow you to play  
16 the video.

17 Because they are talking about MPEG files, which  
18 are very huge at that time. They are not talking about MP3.  
19 They haven't come along yet.

20 JUDGE WARD: I am still trying to understand.  
21 And the gist of my question is that our definition of episode in  
22 short is that an episode is a series of related segments. And  
23 what you proposed is that an episode is a series of related  
24 programs.

1 I am trying to understand what the difference is  
2 between a program and a segment in those two constructions?

3 MR. FEMAL: Well, in that particular context the  
4 program is the entire program, in other words, the entire  
5 episode 33 of Seinfeld, season 1, or whatever.

6 JUDGE WARD: And a segment of that Seinfeld  
7 episode would be the first five minutes?

8 MR. FEMAL: Would be the first five minutes, the  
9 middle five, ten minutes, or, you know, the tail end of 30  
10 minutes before the commercial would be segments.

11 JUDGE WARD: But those segments are  
12 components of an episode, correct?

13 MR. FEMAL: Can be components of an episode, if  
14 you are talking about an episode.

15 JUDGE WARD: So if I had enough segments, I  
16 could have multiple episodes?

17 MR. FEMAL: A person may choose to download  
18 probably -- in Seinfeld, you can download the whole thing,  
19 obviously, the whole episode, but if you want to break it into  
20 segments, you can take an episode and break it into segments.  
21 And I think that is what is confusing about the Petitioner's  
22 claim that these little individual segments are episodes.

23 JUDGE SNEDDEN: What do you suggest they are?  
24 They are segments of a program?

25 MR. FEMAL: Pardon?

1 JUDGE SNEDDEN: What do you suggest they are?  
2 They are segments of a program?

3 MR. FEMAL: They are unrelated, unrelated  
4 snippets of the news. I have an article about saving the whales.  
5 I have an article about the terrible weather in California.

6 JUDGE SNEDDEN: They are related in that they  
7 were presented together in the world news program?

8 MR. FEMAL: They are grouped together as  
9 segments, but they are not episodic, have no theme. What is  
10 the theme between the whales being saved and a storm in  
11 California?

12 JUDGE ANDERSON: So what part of column 29  
13 are you pointing to that says segments are somehow different  
14 from episodes?

15 MR. FEMAL: Let me look at my notes here, Your  
16 Honor.

17 JUDGE SNEDDEN: For us it is a little different.  
18 Now that we may have an understanding, is there -- what  
19 evidence on record would support that, your definition, your  
20 construction?

21 MR. FEMAL: Well, Your Honor, basically going  
22 from columns up through column 21, it talks about episodes and  
23 defines what episode is. And, in particular, you have column 6,  
24 let's see here, column 6 starting at line 60, you have the host  
25 server 101 periodically transmits a download compilation file

1 145 upon receiving request from the player 103. The file 145 is  
2 placed in a predetermined FTP download file directory and  
3 assigned a file name known to the player 103. At a time  
4 determined by player 103 monitoring the time of day clock 106,  
5 a dial-up connection is established via the service provider, and  
6 the Internet, and the server downloads compilation file 145. It  
7 is transferred to the program data store 107 in the player. And  
8 then a person can look up in the compilation file what, what  
9 episodes that he is interested in. At the top of column 7, and  
10 then going on to line 10 --

11 JUDGE SNEDDEN: So that compilation file would  
12 contain episodes selected by the user or --

13 MR. FEMAL: That compilation file could contain  
14 whatever the user wants to put in a compilation file, but it has  
15 all of the information that he is looking for.

16 And then I guess to go back to another thing about  
17 theme, Judge Ward, you were asking about theme. You can ask  
18 yourself a question does it matter which order you watch the  
19 news program in? If you watch the vegetable first, is that  
20 better than watching Jupiter? If it doesn't matter, then it is  
21 probably not an episode in a series of episodes. There is no  
22 relationship to the order that they are in. It would be highly  
23 episodic at that point.

24 JUDGE WARD: So are you saying an episode  
25 indicates a series that must be watched in a specific order?

1           MR. FEMAL: You can watch them out of order if  
2 you would like to, Your Honor, but there is a given order to  
3 episodes. Typically, for example, if you jump in at House of  
4 Cards at episode 12, you have no idea what is going on;  
5 thematically, completely lost the thread. You have to go back  
6 and start watching episodes 1 through 11 to find out what the  
7 heck 12 is related to.

8           JUDGE WARD: What about a show like The  
9 Twilight Zone, where each show is independent?

10          MR. FEMAL: I think those are totally independent,  
11 Your Honor.

12          JUDGE WARD: Twilight Zone, no episodes in  
13 Twilight Zone?

14          MR. FEMAL: I wouldn't call it necessarily  
15 episodic. They are all different, not a single Twilight Zone am  
16 I aware of follows another one. One you have people being  
17 eaten alive, you know, at a club and another one talking about,  
18 you know, some interstellar radiation hitting the earth or  
19 something. It is a bunch of unrelated programs.

20          They are programs, though. And you can download  
21 segments of it. If you have CNN, you have a large video file,  
22 but, you know, getting back to the claim language, which I  
23 think is where it is really at, what I found specious in some of  
24 the arguments by their expert, as well as in the briefs, is simply  
25 they are trying to figure in what isn't shown.



1           And for anticipation as Your Honors just mentioned  
2 a while ago, for anticipation, you have to show each and every  
3 element. And if you can't show each and every element, like  
4 Dr. Schmandt said, I don't know where a URL is or what kind  
5 of URL is in CBC radio, when asked that question in his  
6 deposition by me.

7           He simply said: I have no idea what the URL would  
8 be. Well, if he has no idea what the URL is going to be, how  
9 can you have a predetermined URL? How could you have any  
10 of the structure as shown in claim 31?

11           And, moreover, claim 31 calls for very specific  
12 structure. And that structure is clearly not shown in either one  
13 of the references. And I think some of the language that is very  
14 important here, if you go to the claim language, it starts out  
15 with on page 3 of our presentation, a server for disseminating a  
16 series of episodes represented by a media files via the Internet,  
17 as said episode becomes available.

18           And as I said as far as episodic goes, it means that  
19 you have theme-related episodes. And the apparatus applies  
20 one or more data storage service. Well, in CBC, I have no idea  
21 what data storages they have or don't have. And one or more  
22 communication interfaces connected to the Internet. And,  
23 again, when asked those questions of Mr. Schmandt, there is no  
24 answer because there is no structure shown, no drawing shown  
25 as admitted by the Petitioner.

1           JUDGE WARD: Mr. Femal, are you arguing that a  
2 person of ordinary skill in the art, taking a looking at the 103  
3 challenge, a person of ordinary skill in the art, and I will use  
4 your proposed definition, individual with a number of years of  
5 experience working on web sites.

6           MR. FEMAL: Right.

7           JUDGE WARD: Reading the disclosure, this is the  
8 statement from the CNN Newsroom disclosure, "Internet  
9 Newsroom is accessed via the World Wide Web." Is it your  
10 argument that a person of skill in the art reading that would not  
11 understand that that would require a server with a  
12 communication interface and a processor?

13          MR. FEMAL: A person of ordinary skill would  
14 realize that there is a -- well, a processor, at least on the client  
15 side, obviously, to inquire on the web. But what structure is  
16 behind, what the host server is comprised of, you would have  
17 no idea.

18          JUDGE WARD: But he wouldn't know there was a  
19 server, you agree with that?

20          MR. FEMAL: He would know there is a server  
21 somewhere.

22          JUDGE WARD: And wouldn't that server need to  
23 have a communication interface for his client device to be able  
24 to access information on that server?

1           MR. FEMAL: He doesn't necessarily know exactly  
2 what is behind the curtain. To him it is, it is a server, but what  
3 is the structure of the server? What database does it have?  
4 How are things uploaded? How are things --

5           JUDGE WARD: And where in your claim are those  
6 requirements?

7           MR. FEMAL: Those requirements are in claim 31.  
8 You have one or more data storage servers.

9           JUDGE WARD: You agree that one of skill in the  
10 art would know there would be servers, correct?

11          MR. FEMAL: He might know there is a data  
12 storage server but not one or more.

13          JUDGE WARD: Okay.

14          MR. FEMAL: He may know there has got to be  
15 some kind of communication interface, but he doesn't need to  
16 know there is one or more.

17          JUDGE WARD: You would argue that he wouldn't  
18 know that there were multiple?

19          MR. FEMAL: He wouldn't necessarily know that  
20 there are multiple.

21          JUDGE WARD: But your claim doesn't require  
22 multiple.

23          MR. FEMAL: No, just one or more.

24          JUDGE WARD: So you would agree that he would  
25 be aware --

1 MR. FEMAL: At least one.

2 JUDGE WARD: -- of one server and one  
3 communication interface?

4 MR. FEMAL: At least one, um-hum.

5 JUDGE WARD: So what other elements would he  
6 not be aware of in claim 31?

7 MR. FEMAL: He would not necessarily in the CBC  
8 know that there is an URL.

9 JUDGE WARD: I am talking about the CNN.

10 MR. FEMAL: Oh, CNN?

11 JUDGE WARD: The obviousness rejection, which  
12 would look at a person of ordinary skill in the art.

13 MR. FEMAL: Right. The diagram they show just  
14 shows a server. You have no idea what URLs are being used or  
15 not used in that particular --

16 JUDGE WARD: Doesn't it show you a URL at the  
17 top of the web page?

18 MR. FEMAL: It shows a domain name. It might be  
19 a domain name. It might be -- God only knows what. I have no  
20 idea what that particular URL might or might not be.

21 JUDGE WARD: It is at the top of the web page.

22 MR. FEMAL: Maybe domain name. I agree it is a  
23 web page. I am not arguing that. But at that particular time, I  
24 have no idea what -- where you go with that particular URL, if  
25 it is unique or if it is whatever.

1                   JUDGE WARD: Your claim requires that it be  
2 unique?

3                   MR. FEMAL: It requires that you get an updated  
4 compilation file from a predetermined URL.

5                   JUDGE WARD: Is the URL listed at the top of the  
6 web page shown in the CNN Newsroom a predetermined URL?

7                   MR. FEMAL: It is a specific URL. But if you try  
8 go and get another news page, you are going to go to a brand  
9 new URL, whatever that might be.

10                  JUDGE WARD: And it was predetermined, was it  
11 not?

12                  MR. FEMAL: I don't know if you would -- as the  
13 patent defines what is predetermined, my, my thing of a  
14 predetermined URL is the URL that has a compilation file.  
15 And that does not lead you to a compilation file in either CNN  
16 or CBC.

17                  JUDGE WARD: You have got about seven minutes  
18 remaining.

19                  MR. FEMAL: Okay. And then what you don't  
20 know is from time to time as new episodes represent -- a series  
21 of episodes become available, that they are starting an updated  
22 version of a compilation file, and one or more of said data  
23 servers at the storage location identified by a predetermined  
24 URL. And there is no indication that there is a predetermined  
25 URL that has all of the episodes.

1           JUDGE WARD: You do agree that there is a  
2 predetermined URL for a particular page at the CNN web page,  
3 but you do not agree that that predetermined URL leads you to  
4 a compilation file; is that correct?

5           MR. FEMAL: That's correct.

6           JUDGE WARD: And that is because that  
7 compilation file was created brand new for that particular day  
8 and was not an updated version of a previously existing file?

9           MR. FEMAL: That's correct, Your Honor.

10          JUDGE WARD: And what is the difference  
11 between an updated version of a file that completely wiped  
12 away the previous file and has new contents and what you are  
13 telling me about --

14          MR. FEMAL: Because it has the old content, Your  
15 Honor, and the new content. And you can tell exactly where  
16 you want to go in the episodes.

17          JUDGE WARD: So your claim requires that that  
18 compilation file retain some information from the previous  
19 version of the file?

20          MR. FEMAL: It would have previous information  
21 from the previous files, that's correct.

22          JUDGE WARD: Where in the claim do I get that  
23 limitation?

24          MR. FEMAL: Because, because it says an updated  
25 version of the compilation file contains attribute data

1 describing currently available episodes in said series of  
2 episodes and said attribute data for each given one of said  
3 currently available episodes.

4 So if there is one currently available in that file, it  
5 has got to have some kind of information there, Your Honor.

6 JUDGE WARD: Yes, but let's leave the episode  
7 argument aside for the moment and consider --

8 MR. FEMAL: Okay.

9 JUDGE WARD: -- that if I am reading the claim,  
10 storing an undated version of a compilation file in one or more  
11 servers, describing currently available episodes in the series of  
12 episodes, the CNN file created for today, Wednesday, is going  
13 to list programs available for today, and it is updated in the  
14 sense that it is newer than yesterday.

15 It doesn't contain any of the information from  
16 yesterday, but I don't understand how your claim requires that  
17 that updated version somehow retain a portion of previously  
18 provided compilation file data?

19 MR. FEMAL: Because it said given said currently  
20 available episode and one or more episode URLs specifying in  
21 the storage locations of one or more corresponding media files.  
22 And it said episodes. It is plural. It is not a single episode.

23 JUDGE WARD: Right. Well, and let's leave the  
24 episode argument aside for a while. Let's just assume that  
25 what is disclosed in the CNN Newsroom are multiple episodes.

1 It has multiple episodes. It doesn't happen that there is any  
2 correlation or overlap from the previous days, but it has  
3 multiple programs.

4 MR. FEMAL: Right, it is a brand new program  
5 each day, brand new content.

6 JUDGE WARD: It is an updated version, multiple  
7 programs.

8 MR. FEMAL: It is not necessarily an updated  
9 version. It is a brand new version. Because updated says,  
10 basically implies, if you want to go into inherent arguments  
11 that they are using for structure not shown in their two articles  
12 --

13 JUDGE WARD: But in that you are requiring me to  
14 construe "updated" to mean "carryover," that you are  
15 prohibiting the term updated to being applied to something that  
16 was -- the old data was wiped out and all new data was  
17 inserted?

18 MR. FEMAL: Yeah, it is an updated compilation  
19 file. All of the episodes that are available are in that. Not just,  
20 you know, a single file is created each day and there is no  
21 compilation file. Where is the compilation file in these two  
22 articles? I can't find it, Your Honor. There is no reference to  
23 it.



1           And there is no reference to -- if they wanted to say  
2 they were updating, and these weren't brand new, they would  
3 say the word updating in the CNN article. It is not there.

4           JUDGE SNEDDEN: It seems that argument always  
5 goes back to how we construe "episode." Right? The  
6 contents.c file is not a compilation file because it only contains  
7 information for today, which you don't require -- which you  
8 don't seem to agree that that's an episode.

9           MR. FEMAL: Your Honor, claim 31 talks about  
10 episodes, but I am not saying that the compilation file doesn't  
11 have news segments. It may have news segments in it. So  
12 what?

13          JUDGE SNEDDEN: Well, so what? Because that's  
14 -- I think I understand your argument.

15          MR. FEMAL: But it is updated too. So even if you  
16 are adding new news articles, you have an updated file. You  
17 don't have an updated file with CNN. There is no reference to  
18 there being a compilation file there. They go back and find a  
19 compilation file and see that it is updated with a brand new  
20 news or that the old stuff from last year is there too.

21          JUDGE SNEDDEN: So that's an updated file, not  
22 an updated compilation file?

23          MR. FEMAL: Right, the compilation file has all  
24 the content in it, Your Honor.

1                   JUDGE WARD: About a minute and a half remains,  
2 Mr. Femal.

3                   MR. FEMAL: Okay. Well, in closing, the main  
4 argument, I think, that comes across is the CNN is, you know, a  
5 satellite, high-tech, very large files. They have all kinds of  
6 problems. They have all kinds of special software. There is no  
7 reference to a compilation file. There is references to brand  
8 new structure and brand new things that you can possibly do.

9                   But there is no updated compilation file with  
10 episodes in it. And the news articles definitely are not related  
11 to one another, as our claim construction was that episodes  
12 would be related to one another.

13                   Thank you, Your Honors.

14                   JUDGE WARD: Thank you. Mr. Brown, you have  
15 20 minutes remaining.

16                   MR. BROWN: Thank you, Your Honor.

17                   I would like to start with the language of claim 31.  
18 And I want to clarify exactly what the claim requires about the  
19 compilation file, about the episodes.

20                   I am on slide 3, as -- the first part of claim 31. I  
21 am not going to discuss this part of the claim because we  
22 haven't gotten to the compilation file at this part of the claim in  
23 any detail of what we have in the first part of the claim that is  
24 shown on slide 3 is you are disseminating a series of episodes.  
25 You are using a server to do it. And --

1                   JUDGE ANDERSON: Counsel, you are going to  
2 need to get closer to the microphone, if you want me to hear  
3 this.

4                   MR. BROWN: I apologize, Your Honor, let me  
5 start again.

6                   What you have in the part of claim 31 that is shown  
7 on slide 3, you have the preamble, which explains that you are  
8 disseminating a series of episodes over the Internet. Then you  
9 have some hardware components, three of them; the data  
10 storage server, the communication interface, and the  
11 processors.

12                   And then you have an explanation of what those  
13 things are doing specifically. And for part of the claim here is  
14 just so far we only have the media files for each episode. So  
15 you have a media file for each episode, and I want to just  
16 emphasize that that media file is stored at a storage location  
17 specified by a unique episode URL.

18                   So when they wanted to claim a unique URL, they  
19 knew how to do it and they did it.

20                   Now let's go to the next slide, slide 4. Here is  
21 where we have the actual language about the compilation file.

22                   From time to time, as new episodes represented in  
23 the series become available, storing, storing an updated version  
24 of a compilation file at the storage location identified by a  
25 predetermined URL. And what has to be in that file? There

1 has to be attribute data -- I am paraphrasing here. And what  
2 does the attribute data have to have? It says, "said attribute  
3 data for each given one of said currently available episodes,  
4 including displayable text and one or more episode URLs  
5 specifying the storage locations."

6 So what do you have for the compilation file? It  
7 has to contain URLs, links to the files, and it has to contain  
8 text about the files. That's what it has to be. It tells you what  
9 a compilation file is right there in the claim.

10 Now, we heard an argument that it has to describe  
11 all episodes. That is not what it says. In fact, it specifically  
12 says that it has to describe currently available episodes. It  
13 doesn't say all currently available episodes either. It says  
14 currently available episodes.

15 JUDGE WARD: How do you respond to Mr.  
16 Femal's argument that updated means it retains some of the  
17 previous information?

18 MR. BROWN: My response to that is three things.  
19 First, that isn't the only meaning of updated in ordinary English  
20 usage. Second, in the patent it explains what the compilation  
21 file is and why it is updated. It is updated so the player can  
22 download the new program segments.

23 So it served the purpose of the compilation file as  
24 described in the patent at column 6 and column 7. It just has to  
25 contain the new ones. And then, third, I asked their expert, as I

1 have said, specifically in his deposition about this updated  
2 issue. And counsel argued: Well, I didn't ask him about  
3 program segments, that I was -- I'm sorry, that I was asking  
4 about program segments, that I wasn't asking about episodes.

5 And I just want to address that, because I think the  
6 language is actually very clear in the deposition. Excuse me  
7 while I find the citation.

8 I'm sorry, it was clear both on episodes and on  
9 updated. So let me --

10 JUDGE WARD: Can you tell us which exhibit you  
11 are going to refer to, Mr. Brown?

12 MR. BROWN: I am going to refer to the deposition  
13 transcript, which is Exhibit 1031.

14 JUDGE WARD: Thank you.

15 MR. BROWN: And in Exhibit 1031, at page 91,  
16 and I was asking him about -- and I am going to go to slide 18.  
17 I was asking him about figure 3 of the CNN reference. And I  
18 asked him: The table of contents, in particular the  
19 contents.html file is generated each day for each Newsroom  
20 program; correct?

21 "Answer: Yes."

22 And in particular there is a program identified here  
23 as contents.c that is run each day and generates the HTML file,  
24 contents.html for each Newsroom program, right?

25 "Answer: Yes, that's what it looks like.

1                   "Question: That means the contents.html file is  
2 updated each day to reflect the most recent broadcast of CNN  
3 Newsroom, correct?

4                   "Answer: Yes, I believe so."

5                   So in sum the reasons are that updated means,  
6 includes a new file does not require that the file be updated in a  
7 specific way by being amended. The reasons are, Number 1,  
8 the ordinary meaning of the word "updated" and, Number 2, the  
9 way the compilation file is described in the patent and what it  
10 needs to be to accomplish the purpose in the patent, which is to  
11 download the new episodes -- excuse me, segments to the  
12 player. And, Number 3, because I specifically questioned  
13 Personal Audio's expert about it, and he acknowledged that  
14 what is described in the CNN reference is an updated file.

15                  JUDGE WARD: How do you --

16                  JUDGE ANDERSON: Counsel, what about the  
17 language, what about the language in the claim 31 that says, "as  
18 new episodes represented in said series of episodes become  
19 available, storing an updated version of a compilation file in  
20 one or more of the storage of the servers."

21                  So is CNN, as I understand CNN is updated daily, I  
22 understand that, but each day that it is updated, it already has  
23 predefined content, three or four new episode segments,  
24 whatever, are available in that compilation file, so there really

1 is nothing -- there is nothing that gets added as a new "episode"  
2 becomes available or am I wrong?

3 MR. BROWN: Well, let's -- let me look at the --  
4 get the claim language in front of me, Your Honor. Let's go  
5 through it. And I will map it to what is disclosed in CNN for  
6 you.

7 At a high level, you have a right, what CNN is  
8 describing is a way of digitizing, an automated digitization  
9 system that took the CNN news broadcast, whether it was an  
10 educational broadcast at 3:45 a.m. every morning, it was  
11 intended for teachers to record and use in their classrooms. It  
12 captured the broadcast and in automated ways it divided it into  
13 pieces, into segments. And it generated this contents.html table  
14 of contents file describing each and linking to each. So let's  
15 look at the language of the claim.

16 And you pointed to it. It says, just reading from  
17 claim 31 here, "from time to time as new episodes represented  
18 in said series of episodes become available." So every morning  
19 at 3:45 a.m. for the next 15 minutes there is a new broadcast of  
20 CNN Newsroom. Every morning that is recorded.

21 I am now looking again, I am still on slide 18, and  
22 multiple sources of information must be processed and merged  
23 each night. They record the broadcast. I believe they also -- I  
24 forget specifically the other source. I believe there was some

1 sort of a production notes that were intended for the teacher.  
2 They are also disclosed.

3 Those are processed together. Excuse me, it is the  
4 curriculum guide, I am reminded. In figure 3, there is a  
5 reference to the curriculum guide. That is processed by this  
6 program, contents.c, in order to generate the contents.html file  
7 for that particular broadcast.

8 JUDGE ANDERSON: Counsel, I'm sorry to  
9 interrupt, but the question that I really have is, okay, so there is  
10 an updated compilation file every day, but the claim suggests to  
11 me -- and maybe more than suggests -- that new episodes, as  
12 they become available, are updated into that same compilation  
13 file.

14 And it appears that CNN shows that episodes are  
15 there under what we have discussed so far, what your position  
16 is, but the next day a new compilation file is made and it is  
17 never updated as episodes become available. So tell me why I  
18 am missing the boat here.

19 MR. BROWN: Your Honor, I think you are  
20 partially right. So if you look at the figure 3 in CNN  
21 Newsroom, what it shows is that every day the content is  
22 updated into the same contents.html file. What it doesn't show  
23 is that old contents.html content, the file that was in that file  
24 from before, is left in the file. It isn't. It is always clearly  
25 being overwritten.



1           So that is the issue. You have a file that is being  
2           overwritten each day with new content. And the plain language  
3           of updated version of a compilation file, we believe, includes  
4           that. But let's talk about the situation that it doesn't. Let's talk  
5           about that.

6           What does the patent show us? Actually, I don't  
7           have a slide on this, I apologize, but if you go to page 30 of the  
8           CNN reference, I'm sorry, it is page 30 of the exhibit and it is  
9           page 29 of the reference. What does it say? It talks about how  
10          the techniques that are described here -- and I will quote --  
11          "could add significant value to other general news programs or  
12          specialized news programs." And here is the key part -- "or  
13          any other program for which users might want to be able to see  
14          past episodes, i.e., other news programs, sitcoms, soap operas."

15          So this reference is saying expressly so that it can  
16          be applied to exactly the situation that Personal Audio is  
17          arguing it should have been applied, you know, that its patent  
18          is describing where you want to -- you have a television show  
19          like a sitcom and you want to be able to get past episodes, as  
20          well as the currently available episodes of the sitcom.

21          Now, I don't think that's what the claim requires,  
22          but if that is what the Board believes the claim requires, CNN  
23          expressly teaches that that is, can be accomplished using the  
24          mechanism that is described in detail. And there is no  
25          argument, no argument from Personal Audio about how it could

1 possibly make any sort of technological difference on this  
2 issue.

3           The Board's Institution decision -- and I don't have  
4 a page number in front of me -- but the Board's Institution  
5 decision specifically pointed out that the preliminary response  
6 by the Patent Owner didn't contain any logic under KSR  
7 explaining how this was a non -- that if there was a requirement  
8 of a different amended compilation file with old content, that  
9 this was somehow more than -- it was somehow predictable and  
10 it was somehow more than a trivial mechanism.

11           And even after the Board specifically pointed that  
12 out, there has been no showing and no evidence from Personal  
13 Audio on that point. None.

14           Why is that? Well, when I asked their expert about  
15 what was known and understood, one of the things that I asked  
16 him about, what a person of ordinary skill in the art would  
17 understand to be able to do at the time was specifically about  
18 creating an updated version of a table of contents for a web site  
19 with links to a media file.

20           And so I will refer to the transcript of Dr. Nelson,  
21 generally from page 79 through page 82 is what we quoted in  
22 our reply. And I am going to read to you particularly at the end  
23 of that series of questions -- actually, I will start at the  
24 beginning, just to set the context.

1 I asked him: "People of ordinary skill knew how to  
2 include media files such as pictures in their web pages, right?

3 "Answer: Yes." That's on page 79 from 12 to 16.

4 And then skipping forward to page 81, my question  
5 was: "Suppose you have a web site that has a web site --  
6 excuse me, that has 10 HTML files and ten images and you  
7 have got -- you would know" -- I apologize for my bad  
8 questioning in this deposition -- "you would know how to  
9 generate a table of contents.html file that had links to all 20 of  
10 those things, right?

11 "Answer: Okay.

12 "Question: Is that true?

13 "Answer: Yes.

14 "Question: Now, say that person created one more  
15 image and added it to their web site. Are you with me?

16 "Answer: Yeah.

17 "Question: Would the person of ordinary skill in  
18 1996 know how to update the table of contents to refer to that  
19 new image?

20 "Answer: Yeah, I think so.

21 "Question: Is the same true if they added an 11th  
22 web page, so a new HTML file?

23 "Answer: Right, I agree."

24 JUDGE SNEDDEN: I have a question. Mr. Femal  
25 in argument suggested that what was presented in the CNN web

1 page is not an episode because it contains information that is  
2 not serially related, meaning that it didn't matter what order  
3 you viewed the subject matter, but does it matter what order  
4 you would -- because they were unrelated in that regard.

5           The title of this patent does suggest or just is  
6 systems for disseminating media content representing episodes  
7 in a serialized sequence. And in that sense if I think about  
8 world news, it would be serially related if it was presented in a  
9 matter of say, Monday, Tuesday, Wednesday, when we're just  
10 looking at Wednesday, is it still serialized in this way? Is that  
11 -- how do you address that?

12           MR. BROWN: So I believe it is still serialized.  
13 And the short answer is that I believe it is still serialized  
14 because there is the first story, there is the second story, and  
15 the third story. And I believe that is exactly what is described  
16 in the patent as what a serialized sequence is.

17           So I would like to just refer you, because I think  
18 this is an important point, back to what the patent actually says  
19 about episodes.

20           And so there is three words here that are being  
21 used, program, segment, and episode. And the patent in great  
22 detail discusses program segments. So I believe there is a little  
23 bit of confusion that occurs from trying to separate program  
24 and segment. Because throughout what is described in this

1 patent is how to distribute program segments, the compilation  
2 file provides the new program segments to the subscriber.

3           And so I am just going to start by referring you to  
4 column 18, where there is what I believe is an interesting table  
5 which shows the data structure for a program segment. And I  
6 want to particularly call out to you, because it is about to come  
7 up in the next column, column 19, that there are -- hang on, I  
8 have to get it -- that in the table on column 18, I'm sorry,  
9 column 17, I apologize, one of those data -- the sets of data  
10 fields are group ID, episode. And that is at line 38.

11           So now if we go on to column 19, this is now the  
12 portion of the patent that the Board was describing in its earlier  
13 questions. It explains, when it is talking about serialized  
14 sequence of programs, "a given program segment may represent  
15 an episode in a series, which is selected as a group by a  
16 subscriber."

17           And I think right now what we know so far is that  
18 an episode is a type of program segment that can be selected as  
19 a group by a subscriber. And then it goes on to say -- and the  
20 grammar, I believe -- I believe it is there is a typo in column  
21 19. The grammar is a little confusing. But it says, "a  
22 subscriber may select an individual program in a serial  
23 sequence." And while it only says program there, I think it is  
24 clear from the context, it is referring to the program segment.

1           And then it goes on to say, "the host may then  
2 further installments or related programs," which doesn't make  
3 much sense to me. To me what I think what they meant to say  
4 was the host may then send further installments of related  
5 programs within the series.

6           In other words, it is describing two possibilities  
7 where if you select one episode in a series of related segments,  
8 it may then automatically send you other -- further installments  
9 of related programs within the series. And it is that sentence  
10 that we pointed to in our petition when we were explaining  
11 "related."

12           And I believe that that paragraph, when it is read,  
13 shows that related -- segments are related and episodes, when  
14 they are part of a series, and that's what this patent says. Now,  
15 the part that really clinches it for me, and the reason I pointed  
16 out the table in column 17 is the next sentence, which says "the  
17 program segment record contains a group ID field, which  
18 specifies the series as a whole and an episode integer field  
19 specifies the position of the given program segment within the  
20 serialized sequence."

21           So the patent is explaining the relationship here.  
22 The segments are episodes. They fit within the series as a  
23 whole. They have a group ID field. And they have an episode  
24 ID field, which identifies them specifically.

1           And just -- I heard the beep -- but to wrap up  
2 quickly, under the definition of episode that is provided here in  
3 column 19, their expert acknowledged these are episodes. That  
4 is the definition that is provided in column 19 is exactly what  
5 is supported by the Board's definition.

6           Even if you remove the word "related," even if you  
7 only require the episodes to be part of a series, that is clearly  
8 satisfied by what is disclosed in both the CNN reference and  
9 Quirks & Quarks, because there is a series of stories that are  
10 part of each day's CNN Newsroom broadcast. They were  
11 selected by the CNN staff to be part of that 15-minute segment  
12 that was broadcast at 3:45 a.m. for educational use.

13           You probably aren't going to see graphic murder  
14 stories in there. You are going to see stories that were believed  
15 to be appropriate for use in an educational setting. That were  
16 specifically selected together.

17           JUDGE WARD: Mr. Brown, what about, you  
18 mentioned the Patrick reference. What about the fact that --  
19 and you are relying specifically on the Quirks & Quarks radio  
20 program.

21           MR. BROWN: Yes.

22           JUDGE WARD: From what I view in that  
23 reference, it only discloses one Quirks & Quarks episode.

24           MR. BROWN: Let me go to slide 20. I believe,  
25 Your Honor, that it discloses regularly updating the Quirks &

1 Quarks episodes available on the server. I am putting on page  
2 20. And it says the show is regularly updated on the server.  
3 The hour-long show was automatically recorded each week and  
4 then manually broken into five- or ten-minute segments at the  
5 natural boundaries. So I think that's explaining that it was  
6 recorded multiple times.

7 JUDGE WARD: I have one final question for you  
8 and I will ask my colleagues if they have additional ones. My  
9 final question is, do you have a proposal with respect to the  
10 person of ordinary skill in the art?

11 MR. BROWN: Your Honor, we did have a  
12 proposal. In Petitioner's response, they argued that it didn't  
13 make any difference. I believe that is at page 8. We believe  
14 the same. Whether you adopt their proposal or our proposal  
15 isn't going to make a difference.

16 A person of ordinary skill in the art based on my  
17 questions to Dr. Nelson, who was using his own definition of  
18 person of ordinary skill, knew how to create an updated table of  
19 contents file, knew what a link was, knew that when you had a  
20 link to follow or to download file --

21 JUDGE WARD: So you accept the Patent Owner's  
22 proposal that it is a person with a number of years of  
23 experience in web page development; is that correct?

24 MR. BROWN: If that's -- I want to be careful  
25 because I am not sure that was exactly the proposal in their



1 response. I would accept the proposal in their response, which  
2 is what I understood Dr. Nelson to be testifying about.

3 JUDGE WARD: Okay. Thank you.

4 Judge Snedden, any questions from you?

5 JUDGE SNEDDEN: I have none.

6 JUDGE WARD: Judge Anderson, any further  
7 questions?

8 JUDGE ANDERSON: No, Judge Ward. Thank you.

9 JUDGE WARD: All right. We stand adjourned.

10 Thank you.

11 (Whereupon, at 2:38 p.m., the hearing concluded.)

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